IN THE SUPREME COURT OF THE UNITED STATES

No. [redacted]

ARTHUR GOLDSTEIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

ROBERT A. CURRIN, ESQ.
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In The

# Supreme Court of the United States

October Term, 1973

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No. _____

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ARTHUR GOLDSTEIN,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Arthur Goldstein, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia, entered in this case on the 4th day of March, 1974.

## OPINIONS BELOW

Defendant, Arthur Goldstein, was arrested and charged on December 9, 1970 upon a Warrant issued by Justice of the Peace B.L. Smithwick on December 9,

1970 and tried on January 18, 1971 by His Honor, Judge Llewellyn S. Richardson, in the Municipal Court of the City of Norfolk, Part I, wherein he was adjudged guilty and sentenced to three months confinement and fined $1,000.00. On Appeal, he was tried by His Honor, Judge William M. Guerry, sitting with a Jury in the Corporation Court of the City of Norfolk, Virginia on May 28, June 1 and 2, 1971 and was on June 2, 1971 convicted and found guilty of selling obscene items as charged in the Warrant and sentenced him to pay a fine of $5,000.00.

At the conclusion of the trial the Defendant through his attorneys, moved the Court to set aside the verdict of the Jury as being contrary to the law and the evidence which was denied and exceptions duly noted.

Notice of Appeal to the Supreme Court of Virginia and Assignment of Errors were timely filed.

On July 11, 1972, the Supreme Court of Virginia affirmed the Judgment of the Corporation Court of the City of Norfolk with an Order rejecting and refusing the Petition for Writ of Error and Supersedeas filed on Mr. Goldstein's behalf. That Order was entered on July 11, 1972 and is attached hereto as Appendix "B".

The United States Supreme Court on June 25, 1973, entered an Order vacating and remanding the Judgment in Goldstein v. Virginia, No. 72569.

On March 4, 1974 the Virginia Supreme Court ruled that it was of the opinion to adhere to its ruling rendered on July 11, 1972, and affirmed the Judgment rendered by the Circuit Court of the City of Norfolk, formerly the Corporation Court of the City of Norfolk. This Order of the Supreme Court of Virginia was entered on March 4, 1974, and is attached hereto as Appendix "C".

On the 27th day of March, 1974, the Supreme Court of Virginia stayed the execution and enforcement of the Judgment of March 4, 1974 until the 2nd day of June, 1974, (which happens to fall on a Sunday), pending action by the Petitioner to perfect his review by this Honorable Court and a continued stay until a final determination by the United States Supreme Court.

This Order of the Supreme Court of Virginia was entered on March 27, 1974, and is attached hereto as Appendix "D".

## JURISDICTION

The decision of the Supreme Court of Virginia was rendered on March 4, 1974. This Petition follows within 90 days thereof, Jurisdiction is invoked pursuant to 28 U.S.C., Section 1257 (3).

## QUESTIONS PRESENTED

1. Is the Commonwealth of Virginia obscenity statute, Section 18.1-228 of the Code of Virginia, 1950, as amended, void for vagueness and overbreadth in violation of Petitioner's rights under the *1st* and *14th Amendments* to the Constitution of the United States by virtue of this Court's decision in *Miller* v. *California, et als,* decided on the 21st day of June, 1973?

2. Are the items charged against Petitioner obscene in the constitutional sense and, therefore, not permitted protection under the law as it was applicable at the time of the sale?

3. Was it constitutionally necessary for the warrants to charge scienter and was there adequate affirmative proven evidence of scienter as is required by Due Process?

4. Does the State Court's utilization of a purely local contemporary community standard, as opposed to a state-wide contemporary community standard violate Petitioner's rights under the *1st* and *14th Amendments* to the Constitution of the United States?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *1st, 4th, 5th, 6th* and *14th Amendments* to the Constitution of the United States and the Code of Virginia, as amended, Section 18.1-227, et seq, are set forth as Appendix "E" hereto.

## STATEMENT OF THE CASE

On December 8, 1970, Sergeant Leonard M. Merritt, Norfolk, Virginia Police Department and Investigator for the Commonwealth Attorney's Office, acting on orders of the Commonwealth Attorney's Office entered the Henderson News Stand, 311 Granby Street, Norfolk, Virginia in order to purchase obscene material using his own discretion without knowing the definition of obscenity in the statute (T-92, Line 25, T-93, Line 17). Arthur Goldstein, Defendant, was the clerk in the store at that time. Sergeant Merritt purchased several publications, 1) "The Power of Love, Volume 2," C-1; 2) "The Power of Love, Volume 1," C-2; 3) "The Homosexual Marriage," C-3; 4) "The Lesbian, The Homosexual and the Bisexual," C-4; 5) a movie "Eight Inches", C-5; 6) "Sex in Marriage," lost by Commonwealth and not in evidence; 7) a prophylactic, C-6 not admitted into evidence upon ruling of Court; 8) a book of matches, C-7.

The officer made an *ad hoc* determination on the

obscenity of each item to make his selection and took them to the First Precinct, police station where they were placed under lock and key (T-104, Line 4-14). The items, publications and film were not viewed in their entirety (T-89, Line 23 - T-90, Line 17; T-96, Line 3-10).

On December 9, 1970, Sergeant Merritt removed the purchased materials and went to the office of Justice of the Peace, B.L. Smithwick requesting an arrest warrant charging Defendant with sale and possession with intent to sell obscene items. Justice Smithwick issued the arrest warrant based on the *ad hoc* determination and conclusory assertions of the police officer without scrutinizing the presumptively protected *First Amendment* material sought to be condemned by the judicial officer (T-105, Line 7 - T-110, Line 22) in determining if any of the material was obscene.

On the same date the warrant was issued and executed upon the Defendant. The warrant charged in one count "sale and possession with the intent to sell obscene items." The warrant failed to allege the Defendant "knowingly" committed an offense and failed to specify to whom any sale or intended sale was made and further failed to specifically delineate what "items" were charged as obscene. The warrant failed to specify a separate count for each offense charged.

Defendant was tried on January 18, 1971, before His Honor, Judge Llewellyn S. Richardson in the Municipal Court of the City of Norfolk wherein he was found guilty and sentenced to three months confinement and fined $1,000.00

On appeal before His Honor, Judge William Moultrie Guerry, the Court denied a formal Motion to Dismiss and also denied a formal Motion to Limit

Testimony of Witnesses who were alleged to have pretried the matter at a police community relation's meeting which was denied (T-5, Line 17 - T-7, Line 4).

During the course of the trial the Court permitted the Commonwealth's experts to testify over objection without proper qualification to so testify (as where Father H.H. Smith did not read the entire book, T-133, Line 19 - T-134, Line 5; and merely read portions he felt significant, T-134, Line 2 - 5; and did not view any completely, T-184, Line 8 - 22, T-185, Line 9, T-86, Line 8, and as to S.T. Barfield, T-256, Line 10 - 24, wherein he observed the photographs more than anything else). Also during the course of the trial a woman juror uttered a comment clearly revealing that she did not have an open and impartial mind but was prejudiced which utterance was made in the presence of other jurors (T-217, Line 2 through T-223, Line 19). Defendant moved for a mistrial due to a denial of trial by impartial Jury which was denied (T-223, Line 23). Father Smith readily admitted that his sampling of opinion was not a random sampling or selected grouping according to a sociologist's criteria (T-138, Line 3-6), and consisted merely of residents of Norfolk (T-138, Line 9). Yet Sergeant Merritt stated the material did not appeal to his prurient interest in sex (T-100, Line 2-7; T-101, Line 1-3; T-102, Line 12-14).

The Court set the tenor of the trial and confined all parties and Jury to consider the community standards of a locality and that they vary from community to community (T-338, Line 20 through T-339, Line 3).

Father Smith admitted that some of the material had some value (T-173, Line 17 through T-184, Line 25) or could possibly have value in that he had not read the text in its entirety. The Court permitted the

Commonwealth Attorney to inquire prejudicially into the sums paid the expert, Dr. R.M. Doud (T-350, Line 6-20; T-353, Line 9 through T-355, Line 8), before the Jury and in argument to them referred to Dr. Doud as being flown back and forth and being paid $300.00 for his testimony (T-501, Line 2-5) and that the dissemination of their material is a profitable operation requesting the maximum fine of $5,000.00 (T-501, Line 22-23), which objection was overruled (T-501, Line 24 through T-507, Line 9), and refused to declare a mistrial.

The Jury returned a verdict of guilty of selling obscene items and set the punishment of Defendant at $5,000.00 fine. This was an increase of the fine by $4,000.00 over the judgment appealed from.

## HOW FEDERAL QUESTIONS ARE RAISED

On behalf of Petitioner, the following affirmative defenses were raised before trial by Motion in the Corporation Court of the City of Norfolk; (a) facial invalidity of the warrants; (b) failure to allege "scienter"; (c) the materials were not obscene for adults as a matter of law; (d) the lack of probable cause upon which to base the issuance of the warrants. At trial and following the Commonwealth of Virginia's case in chief, these motions were renewed together with the following affirmative points: (a) the prosecution utilized local community standards rather than national or state-wide standards; (b) failure to produce affirmative evidence on each element of the offense; (c) and commonwealth testimony on the elements were not expert as required.

The Petitioner filed a timely Petition for Writ of Error to the Supreme Court of Virginia Docketed as R-

13361 raising, among other things, the following points: (a) can an arrest be consummated and a warrant issue upon the *ad hoc* determination of a police officer; (b) must scienter be both alleged and proven; (c) were the arrest warrants facially invalid; (d) is Section 18.1-228 of the Code of Virginia of 1950, as amended, unconstitutional upon its face and/or in its application and threatened application to Petitioner and, therefore, repugnant to the Due Process and Freedom of Expression provisions of the *1st, 4th, 5th,* and *14th Amendments* to the Federal Constitution.

The Supreme Court of Virginia, by Order on the 4th day of March, 1974, affirmed the Judgment rendered by the Circuit Court of the City of Norfolk, on November 23, 1971, (Record No. R-13661).

## REASONS FOR GRANTING THE WRIT

### I.

### The Commonwealth Of Virginia Statute Section 18.1-228 Is Void For Vagueness And Overbreadth In Violation Of The First And Fourteenth Amendments To The Constitution Of The United States.

Section 18.1-228 Code of Virginia of 1950, as amended reads as follows:

"Production, Publication, Sale, Possession, etc. of obscene items. Every person who knowingly:

1. Prepares any obscene items for the purposes of sale or commercial distribution;
2. Prints, copies, manufactures, produces or reproduces any obscene item for purposes of sale or commercial distribution;

3. Publishes, sells, rents, lends, transports in intrastate commerce or commercially distributes or exhibits any obscene item or offers to do any of these things;
4. Has in his possession with intent to sell, rent, lend, transport or commercially distribute any obscene item, shall be guilty of a misdemeanor [1960, c. 233.]"

On June 21, 1973, the United States Supreme Court announced its holdings in five (5) cases submitted after argument which has, from that time, changed the effective obscenity law.

The aforereferenced cases are:

A. *Miller* v. *State of California*, No. 70-73, 413 U.S. 15,

B. *Paris Adult Theatre I, et al* v. *Slaton*, No. 71-1051, 413, U.S. 49,

C. *U.S.A.* v. *Orito*, No. 70-69, 413 U.S. 139,

D. *Kaplan* v. *State of California*, No. 71-1422, 413 U.S. 115,

E. *U.S.A.* v. *12-200 Ft. Reels of Super 8mm Film, et al.*, No. 70-2, 413 U.S. 123.

On the basis of the foregoing decisions, this Court on June 25, 1973 and thereafter by summary action and/or per curiam decisions vacated more than sixty (60) cases and remanded them to the State or Federal Court, as the case may have been, for a review and reconsideration in light of such decisions.

The effect of the Court's decisions on the June 21 and June 25, 1973 obscenity cases has caused irreconcilable conflicts in both Federal and State jurisdictions as to what this Court intended to be done as to pre-June 21st conduct.

The State of Louisiana, in the case of *Gulf States Theatres of Louisiana, et al,* v. *Richardson, et al* on remand concluded that what the U.S Supreme Court had done is to have said that the *Roth-Memoirs* standards employed in the cases before it were unconstitutionally vague and for this reason set down a new constitutional standard. Thus the Supreme Court of the State of Louisiana held its obscenity law unconstitutional and went on to state that it was not the task of the judiciary to authoritatively construe or rewrite legislation and that it was the express function of the Legislature to so act.

The State of Indiana on remand of cases of *Mohney* v. *State* and *Stroud* v. *State* in the U.S. Supreme Court held that the effect of the U.S. Supreme Court's decision was to say that the *Roth-Memoirs* formulation for determining obscenity was unconstitutionally vague and they thus held that their state statutes were likewise unconstitutionally vague. (See *Mohney* v. *State*, 300 N.E. 2d 66 and *Stroud* v. *State*, 300 N.E. 2d 100.)

The Commonwealth of Massachusetts very recently, as reported in Mass. Advance Sheets (1974) and decided on April 23, 1974, ruled that their Obscenity Statute §28A was constitutionally inadequate. See *Commonwealth* v. *George C. Horton*, (Mass. Adv. Sh. [1974] decided April 23, 1974); *Essex Theatre Corporation* v. *Police Commissioner of Boston*, (Mass. Adv. Sh. [1974]); *Commonwealth* v. *Capri Enterprises, Inc.*, (Mass. Adv. Sh. [1974]).

The *Commonwealth* v. *Horton* decision in attempting to analyze the *Miller* opinion commented that in at least one material respect the *Miller* case reduces the area of *First Amendment* protection from that existing under the *Roth-Memoirs* test. Today a

work not "utterly without social value" but of less than "serious literary, artistic, political, or scientific value" may be prohibited as obscene, whereas before it could not. This, by the very nature of the context of the language presupposes that the Court is speaking of the standard in a prospective manner, that is, *after* the decision of *Miller*.

That Massachusetts Court distinguishes between pre-*Miller* and post-*Miller* activities and conduct as rightly and consistently it should have done and thereafter declined to undertake to furnish, even on a prospective basis, a judicial interpretation of that sexual conduct which their statute provides should not be portrayed.

That Court held to not provide even a prospective judicial interpretation of that sexual conduct which the Massachusetts statute provides should not be portrayed. That Court went on to say that to do so would require them to engage in a function which they, perhaps more than many courts, have been traditionally reluctant to perform. It is true that, despite traditional reluctance, that court has for many years undertaken to protect such vestiges of their obscenity statutes as it could from the erosion of waves of constitutional onslaught. In doing so they have suggested that their obscenity statutes apply as far as the Federal Constitution may permit. That itself has been a standard of some uncertainty, subject to abrupt change, as the *Miller* case so clearly shows. It may seem strange that they appear to have abandoned the struggle just as the tide may have turned. It is, however, for that very reason that they declined further to engage in the function of saving judicially a statute which is of great ambiguity on its face.

This Court's majority opinion in *Miller* v. *California*,

supra, delivered by Chief Justice Burger, indicated the cautionary measures and attitudes in the tone of the following language:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc.*, v. *Dallas*, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

The opinion of Mr. Chief Justice Burger speaking for the majority pointing to the prospective operation of the newly announced constitutional standards, after either future legislative enactment or authoritative judicial construction (if possible) stated at page 3164:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice

to a dealer in such materials that his public and commercial activities may bring prosecution. See *Roth* v. *United States*, supra, 354 U.S. at 491-492 (1957)."

" . . . This case involves the application of a State[s] criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. *Stanley* v. *Georgia*, 394 U.S. 629, 637-643 (1968) et als. It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."

*Miller* v. *California*, *supra*, is the pivotal case in which the United States Supreme Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the *First Amendment* protection. It is patently obvious that the Court undertook to formulate standards more concrete than those that have ever existed previously. Clearly, if the provisions of the Statute are to be limited to press materials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically

defined in writing by the legislature, or if specific hard core sexual conduct must be read into the statute by authoritative judicial construction, the present Statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It appears to be very apparent that in view of the *Miller* decision it is now necessary for the Virginia Legislature to create legislation if they so wish, proscribing the tests suggested in *Miller* so that prospectively from the effective date of such legislation any interpretation or construction of the *Miller* test can permissibly be left to the Courts. Such construction by the Courts, of course, can not realistically take place until there exists a constitutionally permissible statute to interpret. The current Virginia Statute §18.1-228, Code of Virginia, 1950, as amended, omits any specificity of any definition of sexual conduct as required by the *Miller* decision and must fail the constitutional test. Any post-*Miller* judicial construction by the Virginia Supreme Court to attempt compliance with the *Miller* decision must also fail as to the Petitioner as he would be without the fair and reasonable warning and notice required by the Due Process Clause of the Constitution of the United States.

Along these lines, reference is again made to this Court's recital in *Miller* v. *California, supra:*

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice

to a dealer in such materials that his public and commercial activities may bring prosecution."

It is respectfully submitted that any case pending trial or review based on pre-June 21, 1973 conduct, should be set aside where there has not been given the "fair warning or notice" suggested by this Court in *Miller*.

Any case, criminal or civil pending trial or appellate review based on pre-*Miller* conduct, in a jurisdiction where as, in the case at bar, there had been no authoritative judicial construction specifically defining the punitive patently offensive hard-core sexual conduct prior to the date on which the sale of the sexual materials allegedly occurred should be granted certiorari by this Court and revised. To "invisibly write into" the statute as stated or as subsequently might be construed by authoritative judicial construction so as to eliminate the State Legislature from having to enact a valid constitutionally permissible statute punishes one for conduct that was not criminal at the time that it was committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. It is, therefore, apparent that the constitutional requirement of definitiveness is violated by the Virginia statute because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held punitively responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in such conduct.

If this Court should fail to strike down the Virginia Statute as being vague and constituting overbreadth the

end result would be to permit an unforeseeable judicial enlargement of such criminal statute which would, in effect, be applied retroactively and operate as if it were an approved *ex post facto* law. This Court would have no problem in striking down an *ex post facto* law passed by the Congress of the United States or a State Legislature and it is respectfully submitted that this Court should have as little problem in insuring that the judicial construction does not accomplish the same unlawful end.

The basic rule is that a penal statute is void for vagueness where it is not sufficiently explicit to give fair notice and fair warning of what conduct is forbidden and proscribed. *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *United States* v. *Harriss*, 347 U.S. 612 (1954); *Rabe* v. *Washington*, 405 U.S. 313 (1972).

This principle is also applicable where the uncertainty of the statute is not clearly revealed until and except by the court's decisions. In *Bouie* v. *City of Columbia*, 378 U.S. 347, at p. 352, the court said:

> " . . . If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta*, or the 'guess at [the statute's] meaning and differ as to its application,' as in *Connally*, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

Accordingly, the utilization of *Miller* standards for pre-June 21, 1973 conduct is violative of Petitioner's

constitutional rights and his conviction should be set aside and this case should be reversed.

## II

## The Items Charged Against Petitioner Are Not Obscene In The Constitutional Sense And Should Be Provided Protected Expression Under The First And Fourteenth Amendments To The Constitution Of The United States As Applicable At The Time Of The Alleged Sale.

A fountainhead for the definition of obscenity decided well over a decade ago was *Roth* v. *United States*, 354 U.S. 476. The primary question there was whether obscenity constituted protected expression under the *First Amendment*. This Court ruled then that it did not. The opinion also held that the constitutional protection was available to all ideas having even "the slightest redeeming social importance". The Court further held that sex and obscenity were not synonymous and that ceaseless vigilance was the watchword to prevent the erosion of freedoms under the Constitution.

On April 7, 1969, the Supreme Court in a decision of paramount importance came to grips with the problem once again and finally upheld the right to private possession of *First Amendment* materials irrespective whether they were "hardcore" pornography or not in the matter styled *Stanley* v. *Georgia*, supra, Mr. Justice Marshall stated:

> "It is now well established that the Constitution respects the right to receive information and ideas

> . . . This right to receive information and ideas regardless of their social worth . . . is fundamental to our free society."

Along these lines, Mr. Justice Douglas in *Griswold* v. *Connecticut*, 381 U.S. 479, stated:

> " . . . (T)he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. *The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . Without those peripheral rights the specific rights would be less secure.*" (Emphasis supplied.)

One, who has the constitutional right to possess "Obscene" material and the right to receive it, of necessity must have the right to purchase the materials. It cannot be argued that the right to read a book or newspaper is secure and by statute preclude the sale or dissemination of the same publications. These same citizens cannot be required to obtain the materials illegally in order to lawfully possess them.

On April 29, 1970 the United States District Court for the Eastern District of California in *U.S.* v. *Robert Irvine Lethe*, 312 F. Supp. 421, heard a case wherein the defendant was arrested and tried for mailing "nonmailable" obscene materials. One of the defenses presented was an attack upon the indictment asserting the government cannot constitutionally make it a crime to send obscene materials through the mails to an adult who requested them, reference having been made to *Stanley* v. *Georgia*, supra. The Court sustained this contention.

In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), the Supreme Court struck down the Connecticut statute restricting the dissemination of contraceptive information and materials to willing adults. The Court held that the freedom of speech and press includes the right to distribute, receive and read. In essence, where a willing adult sought information, the State could not place an impediment to the receipt and use of the materials consistent with fundamental *First Amendment* freedoms.

In the case styled *U.S.* v. *Various Articles of Obscene Merchandise, (Schedule No. 495)* U.S.D.C., S.D. N.Y., *Case No. 68 Civ. 2971* (decided 6/8/70), the Court held that a citizen may constitutionally obtain and receive "obscene" material through importation. The Court held that the customs statute was unconstitutional in its application wherever a citizen desired to receive these materials whether obscene or not.

The publications involved in the case at bar should be judged, if at all, by the status of the law and the standards being applied by the Courts as of the time of the conduct complained of. Briefly, the law which was being applied at that time by this Court permitted a certain type of judicial review which has been characterized as the *Redrup* approach (*Redrup* v. *New York*, 386 U.S. 767.) This Court, in essence, suggested that the evil to be defeated was that of the sale to minors or the aggressive forceful foisting of the material or publications upon an unwilling recipient.

In the case at bar, the recipient was far from unwilling, but in fact, was an undercover Detective requesting the publications as a "test case".

It is significant to note that findings of obscenity have been reversed as to press materials devoted

entirely to explicitly depicting or describing the sexual activities of its characters, including detailed descriptions reaching the ultimate in explicitness of heterosexual intercourse, masturbation, bestiality, oral-genital intercourse, sado-masochism, and homosexual activity; *e.g.*, *Memoirs* v. *Massachusetts*, supra; *Aday* v. *United States*, 375 F. 2d 855; *Corinth Publications* v. *Wesberry*, 146 S.E. 2d 764; *Grove Press* v. *Gerstein*, 378 U.S. 577 (1964) ("Tropic of Cancer").

With respect to pictoral publications the Court has reversed findings of obscenity as to films which depict totally nude women, films which show nude or partially nude women and men engaged in sexual gyrations, simulated intercourse, and simulated oral-genital intercourse, all emphasizing pubic and rectal areas, films showing lesbian sexual activity and heterosexual activity between men and women. Moreover, the Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity of a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus* v. *Pitchess*, 429 F.2d 416 (CA-9 1970), *aff'd* 400 U.S. 922 (1970), *sub. nom.*, *Pinkus* v. *California*.

It would, therefore, seem to be that any publication containing pictorial material which depicts, graphically and exclusively, nudes in sexual poses and movement, even without presence of social importance, is constitutionally protected. It is, therefore, respectfully submitted that the publications at bar when considered as a whole, and as judged against press materials and pictorial materials of similar sexual content heretofore determined by this Court, not to be obscene in the constitutional sense, should thus be held protected, and

the decision of the Supreme Court of Virginia should be summarily reversed.

## III

## The Due Process Clause Of The Constitution Renders It Necessary For The Warrants To Allege And The Prosecution To Adequately Prove Scienter In Order To Support A Conviction.

The warrant filed charging Petitioner with violating the Virginia obscenity statutes fails to recite any factual allegations constitutionally sufficient to make out an alleged offense, nor does it include the essential element of "scienter" or guilty knowledge. The warrant merely recites "items" in the language of the statute in a conclusory way. There are no allegations as to a depiction of sexual activity, that there was, in fact, "pandering" as found significant in *Ginzburg* v. *United States,* 383 U.S. 463, nor is there alleged an attack upon the privacy of an unwilling adult individual. Therefore, the Petitioner, at every stage of the proceedings commencing with the indictment, was unable to ascertain specifically what it was in the publications sold that were purported to be, in fact, obscene.

It was effectively stated in *United States* v. *Luros,* 253 F. Supp. 160, (1965), (reversed on grounds in 389 F.2d 200 (1968) that:

> "An indictment is sufficient if it (1) alleges all of the elements of the offense, (2) fairly informs the defendant of that which they must be prepared to meet in the preparation of their defense, and (3)

enable them to plead an acquittal or a conviction in bar of future prosecutions for the same offense."

The indictment in the case at bar failed to meet those requirements.

In various jurisdictions wherein the Appellate Courts have construed their respective obscenity statutes to embrace the element of scienter either by implication or by such requirement being expressly stated in the statute, the various state and federal courts have required that an averment be contained in the criminal complaint that the accused had scienter or knowledge of the obscene character or portions of the instant motion picture film and/or publications, and should be set forth with particularity.

In *Cohen* v. *State, Fla.* 125 So.2d 560, the Court held in essence that the Florida state obscenity statute could be construed as though it contains the requirement of scienter, *Smith* v. *People of the State of California*, 361 U.S. 147, however, it was constitutionally required by the Florida Appellate Court that the Defendant be charged in an indictment or information with "knowledge" or "scienter" under any indictment or information initiated under the state obscenity statute.

It was further stated in *Cohen* v. *State*, supra, as follows:

> "It follows from this construction of the subject statute that the information under which the appellant was charged was fatally defective for want of an averment that the appellant had sold and distributed the publications involved, knowing it to be obscene, lewd, etc. in character."

In the case of *State* v. *Oman*, 121 N.W. 2d 616

(Minn.-1963), it was stated:

> "It is well established that the charge must fully, directly, and expressly, without uncertainty or ambiguity, set forth all of the elements necessary to constitute the offense intended to be punished. *Evans* v. *United States*, 153 U.S. 584."

In *People* v. *Douglas*, 209 N.Y.S. 2d 734, 12 A.D. 2d 194 (1961) it was stated by the Supreme Court of New York, as follows:

> "In further argument that the court should construe the statute as requiring scienter for conviction and thus uphold it where two constructions are possible, one of which will hold the act constitutional, he cites *People ex rel. Simon* v. *Bradly*, 207 N.Y. 592, 610-611, 101 N.E. 766, which indicated that the Court construe the statute to require scienter and hold that the Special County Judge was in error when he held the statute unconstitutional.
>
> "It is our view, however, that the indictment is insufficient as it fails to allege knowledge on the part of the defendants. Having decided that scienter is an essential element of the crime it would seem that this element must be alleged in an indictment. The various counts of the indictment state that defendants sold obscene magazines. This is not a crime unless the magazines are sold with the knowledge, actual or constructive, that they were obscene. Such a defect would be jurisdictional."

The record of the proceedings below is completely devoid of any competent evidence that the Petitioner, in fact, had any knowledge that the content and character of the materials upon which he is charged were, in fact, obscene. It is axiomatic that mere possession fails to establish "scienter".

This Court has stated concerning imposed knowledge in *Smith* v. *California*, 361 U.S. 147, beginning at 152, as follows:

> "The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller, if in fact there is to be found in his shop an obscene book. But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold."

Inasmuch as the Virginia Obscenity Statute, Section 18.1-228 of the Code of Virginia, 1950, as amended, specifically sets forth the word, "knowingly" in the first paragraph of the Statute, any conviction in the case at bar with the absence of the allegation of scienter in the warrant and in further absence of evidence of Appellant's scienter during the trial, unconstitutionally abridge and violate Petitioner's freedom of speech and press.

## IV.

## The State Court's Utilization Of A Purely Local Contemporary Community Standard As Opposed To A State-Wide Contemporary

**Community Standard Violates Petitioner's Rights Under The First And Fourteenth Amendments To The Constitution Of The United States.**

In *Miller* v. *California*, supra, this Court held that the Trial Court's use of the "contemporary standards of the State of California" in evaluating the material in question was "consitutionally adequate". "People in different *States* vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." See also *Kaplan* v. *California*, 413 U.S. 115.

In the case at bar the Court held that it was permissible to apply "local" community standards.

It is respectfully submitted that it is constitutionally impermissible in any case to apply "local", as opposed to statewide, community standards in evaluating the prurient interest appeal and the patent offensiveness of allegedly obscene material. The *First Amendment* protects works which, taken as a whole, have serious literary, artistic, political or scientific value, *regardless* of whether the government or a majority of the people approve of the ideas these works represent.

The statewide application set forth in the opinion of *Miller* v. *California*, supra, would by its nature effect uniformity throughout the state and to apply a standard on a local community basis, rather than statewide would result in utter chaos throughout the municipalities and localities of the state in understanding and determining what would be obscene in an individual locality.

The *First Amendment* policy strongly favors the application of statewide, rather than "local,"

community standards in obscenity cases. For when an obscenity determination is made on the basis of a "local" standard and such decision is affirmed by the highest court of the state or Commonwealth, that decision prohibits the sale or exhibition of the material involved throughout the entire state. That would mean that the most conservative and "holier than thou" community within a state could set the standards of obscenity and the restrictions on the right of freedom of the press and freedom of religion for the entire state on the single criteria that the issue of obscenity in a certain book or film was tried in the courts of that locality before ever tested in any other locality in the state.

It would, therefore, appear that to approve a "local" community standard would be to place in the hands of a very few the tastes and cultural advancement of the many who are members of the greater whole state community.

It is respectfully submitted, therefore, that this United States Supreme Court should require that what may be seen and viewed by the citizens of an entire state should, by state law and constitutional permissibility be governed by the community standards of the entire state.

In the California case styled *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P. 2d 535 (1968), *cert. denied*, 395 U.S. 910 (1969), the Supreme Court of California concluded that:

> " . . . on balance a community comprised of the entire State of California is the more appropriate. This standard avoids administrative problems in determining the exact scope of the smaller

> community: whether it should be city, county, individual neighborhood within a city, or whatever. Moreover, a strong policy favors uniformity in application of state criminal law; we promote this policy by assuring that application of the obscenity law in this state will be based on a uniform 'community.' "

Accordingly, to the extent that the opinion of *Miller* v. *California,* supra, and the other decisions of June 21 and June 25, 1973 may have left open the question of local or statewide community standards, it presents a substantial federal question and should be resolved by this Court as indicated above on a statewide basis.

Along these lines, it is significant to note that the Supreme Court of the State of Washington, for example, has already held that the community standards to be applied in accordance with this Court's decisions of June 21 and June 25, 1973, are *statewide* rather than "local." *State* v. *J-R Distributors, Inc.,* 512 P. 2d 1049, 1065 (July 27, 1973).

The Commonwealth of Virginia in the case at bar and in the case of *Price* v. *Commonwealth of Virginia,* 201 S.E. 2d 798, has adopted a purely local community standard as opposed to a state standard for judging obscenity and has stated that it would be difficult, if not impossible, for a Virginia jury to formulate a statewide standard of obscenity, for our state comprises communities with a vast diversity of life styles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities. Moreover, Virginia juries have traditionally relied on local rather than statewide

community standards.

The foregoing rationale of the Virginia Supreme Court of Appeals is illusory in that it ignored the overture from Chief Justice Burger to authoritatively construe its obscenity statute so as to specify the patently offensive hard-core sexual conduct and to adopt the statewide contemporary community standard test as distinguished from the national test, as suggested by the opinion of *Miller* v. *California,* supra.

## CONCLUSION

The Commonwealth of Virginia Supreme Court in its decision in *Goldstein* v. *Commonwealth of Virginia,* affirmed the Judgment below on the basis of *Price* v. *Commonwealth,* by making reference thereto and it is apparent that the constitutional failings in *Price* v. *Commonwealth,* are equally applicable to the case at bar.

Accordingly, inasmuch as the Virginia Obscenity Statute 18.1-228 should be deemed void as unconstitutional and since the Trial Court refused to consider any community standards beyond the local community level and in further view of the fact that the publications were not obscene and that the Petitioner was not afforded due process as to the Commonwealth's allegation in the warrant and proof during the trial of the element of scienter and for all the reasons set forth in the Argument contained in this Petition, Petitioner respectfully prays that this Honorable Court grant this Petition for Writ of Certiorari and that the Judgment of the Supreme Court of the Commonwealth of Virginia of March 4, 1974 be reversed, that the obscenity statute be held to be unconstitutional, and that

the publications be held not to be obscene in a constitutional sense.

Respectfully submitted,

ROBERT S. COHEN, ESQ.
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*Counsel for Petitioner*

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Petition for Writ of Certiorari to the Supreme Court of the United States upon counsel for the Respondent, Andrew P. Miller, Attorney General of Virginia, and Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, Supreme Court-State Library Building, Richmond, Virginia 23219, and Joseph H. Campbell, Commonwealth's Attorney, City Hall Building, Norfolk, Virginia 23510, by depositing copies of said Petition for Writ of Certiorari in the United States Mail, properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served this 29th day of May, 1974.

ROBERT S. COHEN
*Of Counsel for Petitioner*

# APPENDIX A

WARRANT FOR MISDEMEAN

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK, to wit

**To any of the Police Officers of the City of Norfolk:**

WHEREAS **Sgt. L.N. Merritt** **Norfolk Police**
No
hereinafter called complainant of the City of Norfolk,
has this day made complaint and information on oath, before me, **B.L. Smithwick** a Justice
of the Peace of said City, that on the **8** day of **December** 19**70** in said City
**Arthur Goldstein**
hereinafter called accused did unlawfully

**Vio. Sec. 18.1-228 of the State Code of Virginia as amended**

**to-wit ; Sale and possession with the intent to sell obscene items.**
**Place of occurance 311 Granby Street at approx. time 9:45 PM**

and whereas I see good reason to believe that an offense has been committed
These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and take
before the Police Judge of said City in the Municipal Court Part thereof
Judge of the Juvenile and Domestic [illegible] Court of said City in the Juvenile and Domestic
the body of the said accused to answer said complaint and be further dealt with according to law.

And moreover upon the arrest of the said accused by virtue of this warrant I command you in the name of the Commonwealth of Virginia to summon to appear at the same time and place to testify as witnesses on behalf of the Commonwealth touching the matter of said complaint the above named complaint and the following persons

and have there and then this warrant with your return thereon

Given under my hand and seal this **9** day of **December** 19**70**

Justice of the Peace (Seal)

Upon hearing the evidence on the foregoing charge, the above mentioned accused is found guilty as charged in said
warrant, and I do therefore adjudge that he be confined in the jail of the City of Norfolk for the term of
and do pay a fine of $ and $ costs incident to said prosecution
and conviction as provided by law

And I do further require that said accused do give bond with sufficient surety in the sum of $ for the
term of from this date to keep the peace and be of good behavior towards all persons of this
Commonwealth

On motion of said defendant an appeal is granted to the next term of the Corporation Court of the City of Norfolk Part
to wit the first Monday in , 19 and the witnesses above named were
severally duly recognized each, in the sum of One Hundred ($100.00) Dollars payable to the Commonwealth of Virginia
for their appearance before said Court to give evidence on said charge and not to depart hence without leave of said Court

Given under my hand this day of 19

Police Judge

# APPENDIX B

## *VIRGINIA:*

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Tuesday *the* 11th *day of* July, 1972.

The petition of Arthur Goldstein for a writ of error and supersedeas to a judgment rendered by the Corporation Court of the City of Norfolk on the 23rd day of November, 1971, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said corporation court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: Allen L. Levy

Deputy Clerk

# APPENDIX C

*VIRGINIA:*

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Monday *the* 4th *day of* March, 1974.

Arthur Goldstein, Plaintiff in error,

against Record No. R-13661

Commonwealth of Virginia, Defendant in error.

From the Circuit Court of the City of Norfolk
(Formerly the Corporation Court of the City of Norfolk)

On August 3, 1973, the clerk of this court received a copy of an order entered in this case by the Supreme Court of the United States on August 2, 1973, heretofore recorded, which recited that on June 25, 1973, it had ordered that the judgment of this court entered on July 11, 1972, "be vacated, and that this cause be remanded to the Supreme Court of the Commonwealth of Virginia for further consideration in light of Miller v. California, ___ U.S. ___ (1973); Paris Adult Theatre I v. Slaton, ___ U.S. ___ (1973); Kaplan v. California, ___ U.S. ___ (1973); U.S. v. 12 200-ft. Reels of Super 8mm Film, ___ U.S. ___ (1973); U.S. v. Orito, ___ U.S. ___ (1973); Heller v. N.Y., ___ U.S. ___ (1973); Roaden v. Ky., ___ U.S. ___ (1973); and Alexander v. Virginia, ___ U.S. ___ (1973)."

Upon mature consideration whereof, and the court having reconsidered this decision in this case in light of Miller v. California; Paris Adult Theatre I v. Slaton; Kaplan v. California; U.S. v. 12 200-ft. Reels of Super 8mm Film; U.S. v. Orito; Heller v. N.Y.; Roaden v. Ky. and Alexander v. Virginia, is of opinion to adhere to its ruling rendered herein on July 11, 1972, affirming the judgment rendered by the Circuit Court of the City of Norfolk on November 23, 1971, and it is so ordered. See Alexander v. Commonwealth, 214 Va. ___, this day decided, and Price v. Commonwealth, 214 Va. ___ (1974).

Which is ordered to be forthwith certified to the said circuit court.

A Copy,

Teste:

Clerk

# APPENDIX D

*VIRGINIA:*

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Wednesday *the* 27th *day of* March, 1974.

Arthur Goldstein, Plaintiff in error,

against Record No. R-13661

Commonwealth of Virginia, Defendant in error.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment rendered herein on March 4, 1974, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for appeal to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-entitled case rendered on March 4, 1974, be, and the same is hereby, stayed, until the 2nd day of June, 1974, on the expiration of which time the same may be enforced, unless before that time a notice of appeal to the Supreme Court of the United States has been filed in accordance with the Rules of the Supreme Court of the United States and the case is thereafter docketed therein within the time provided by the Rules of that court, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,

Teste:

Clerk

## APPENDIX E

## CONSTITUTION OF THE UNITED STATES AMENDMENTS TO THE CONSTITUTION

### [Amendment I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

******

### [Amendment IV]

**[Security from Unwarrantable Search and Seizure]**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

******

### [Amendment V]

**[Rights of Accused in Criminal Proceedings]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use, without just compensation.

******

**[Amendment VI]**

**[Right to Speedy Trial, Witnesses, etc.]**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Cousel for his defense.

******

**[Amendment XIV]**

**Section 1.**

**[Citizenship Rights Not to Be Abridged by States]**

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

******

## CODE OF VIRGINIA

## OBSCENITY

18.1-227. "Obscene" defined.—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion,

and if it goes substantially beyond customary limits of candor in description or representation of such matters."

18.1-228. Production, publication, sale, possession, etc., of obscene items.—Every person who knowingly:

(1) Prepares any obscene item for the purposes of sale or distribution; or

(2) Prints, copies, manufactures, produces or reproduces any obscene item for purposes of sale or distribution; or

(3) Publishes, sells, rents, lends, transports in intrastate commerce, or distributes or exhibits any obscene item, or offers to do any of these things; or

(4) Has in his possession with intent to sell, rent, lend, transport, or distribute any obscene item, shall be guilty of a misdemeanor. Possession in public or in a public place of any obscene item as defined in this article shall be deemed *prima facie* evidence of a violation of this section.

For the purposes of this section "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another.

18.1-229. Obscene items enumerated.—Obscene items shall include:

(1) Any obscene book or

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, drawing, photograph, film, negative, slide, motion picture; or

(3) Any obscene figure, object, article, instrument, novelty device, or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words, or sounds.